STATE OF MICHIGAN

COURT OF APPEALS

AUTO-OWNERS INSURANCE COMPANY., as Subrogee of John Runco, Plaintiff-Appellant, v PUCKETT COMPANY., INC. and CHRISTOPHER FEEBACK, Defendants-Appellees.	UNPUBLISHED September 19, 2006 Nos. 260658; 261637 Wayne Circuit Court LC No. 02-238251-NZ

Before: Whitbeck, C.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

In these consolidated appeals, plaintiff Auto-Owners Insurance Company appeals as of right from a judgment of no cause of action entered in favor of defendants Puckett Company, Incorporated (Puckett) and Christopher Feeback following a jury trial on plaintiff's claim, as subrogee of John Runco, for negligence. Plaintiff also appeals as of right the trial court's orders awarding defendants case evaluation sanctions pursuant to MCR 2.403(O). We affirm.

I. Basic Facts and Procedural History

This case arises from a dispute involving a furnace that, following repairs performed by defendant Feeback, as employee of defendant Puckett, leaked fuel oil causing substantial damage to the home and personal property of plaintiff's insured, John Runco. Plaintiff, as subrogee of its insured, brought this suit against defendants, alleging, among other things,[1] negligence in the repair of the furnace. After a jury determined that defendants were not negligent in their repair of the furnace, the trial court entered a judgment of no cause of action in favor of defendants. Plaintiff thereafter unsuccessfully moved for judgment notwithstanding the verdict or for a new trial. This appeal followed.

[1] Plaintiff's complaint also alleged claims for breach of contract and warranty. These claims, however, were not advanced at trial and are not at issue on appeal.

II. Analysis

A. Summary Disposition

Plaintiff first argues that the trial court erred in denying its motions for summary disposition on the issues of liability and damages under MCR 2.116(C)(10). We disagree.

A trial court's decision on a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). For the purpose of reviewing a motion for summary disposition, the record must be reviewed in the same manner used by the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998).

Summary disposition may be granted when, excluding the amount of damages, there is no genuine issue as to any material fact. MCR 2.116(C)(10). However, when deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). A genuine issue of material fact exists when, giving the benefit of reasonable doubt to the nonmoving party, the record leaves open an issue on which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). Furthermore, when the truth of an assertion of material fact depends on the credibility of a witness, a genuine issue of fact exists and summary disposition cannot be granted. *Metropolitan Life Ins Co v Reist*, 167 Mich App 112, 121; 421 NW2d 592 (1988).

In seeking summary disposition on the issue of liability, plaintiff argued before the trial court that the evidence overwhelmingly supported its claim that Mr. Feeback negligently performed the repairs conducted on the furnace and, therefore, summary disposition in favor of plaintiff was appropriate. In particular, plaintiff argued that it was not contested that Mr. Feeback, on behalf of Puckett, repaired the Runco furnace on March 16, 2000, and that immediately following his repairs, the Runcos' home was contaminated with fuel oil, resulting in extensive damage to the home's structure as well as personal property located within the house. Citing deposition testimony from Mr. Runco's wife, Kimberly Runco, regarding acknowledgement by Mr. Feeback that he had failed to tighten a "cap," thereby causing the leak, plaintiff further argued that defendants had failed to provide the trial court with any evidence that would demonstrate that there existed a triable question of fact as to liability.

However, plaintiff admits that although Mrs. Runco testified in her deposition that Mr. Feeback admitted to her that he failed to tighten what she remembered to be a "cap," Mr. Feeback testified at his deposition that he never told anyone that he failed to properly tighten a screw or anything else associated with the furnace. Relying on these contradictory statements, the trial court denied plaintiff's motion for summary disposition on the issue of liability, stating that material questions of fact existed. We find no error in the trial court's decision in this regard.

As recognized by this Court in *Metropolitan Life Ins Co*, *supra*, if the truth of an assertion regarding a material fact depends on the credibility of a witness, a genuine question of fact remains and summary disposition may not be granted. The directly contradictory deposition

testimony of Mrs. Runco and Mr. Feeback regarding Mr. Feeback's admission of fault necessitated that the jury make an inquiry into the credibility of each witness as to a material fact.

Moreover, in opposing summary disposition, defendants presented documentation from Linwood Miller, in addition to the deposition testimony of Mr. Miller and Mr. Feeback, which provided evidence that Mr. Miller, not Mr. Feeback, was the only repairperson to have previously worked on the valve where the leak occurred. Additionally, a photograph, relied upon by plaintiff in seeking summary disposition, showing the furnace in question, features a hand drawn circle around the furnace part Mr. Runco, in answering interrogatories, believed to have leaked. Yet, counsel for plaintiff admitted that the area labeled "This valve was not tightened properly" did not depict the valve that in fact leaked. This created a question as to where exactly Mr. Feeback worked on the furnace and the effect his work had on the part that eventually leaked.

When viewed in a light most favorable to defendants, the aforementioned evidence left open issues of fact on which reasonable minds could differ. *Corley*, *supra*; *West*, *supra*. Therefore, we conclude that the trial court did not err in denying plaintiff's motion for summary disposition on the issue of liability because material questions of fact remained unanswered and the jury had to be given the opportunity to weigh the credibility of certain witnesses to assist in answering the questions of fact.[2]

B. Motions for Judgment Notwithstanding the Verdict or for a New Trial

Plaintiff next argues that the trial court erred in denying its motions for judgment notwithstanding the verdict or for a new trial, claiming that the jury's verdict that defendants were not negligent was against the great weight of the evidence and obviously the product of passion or prejudice. We do not agree.

A new trial may be granted on some or all of the issues if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e); *Domako v Rowe*, 184 Mich App 137, 144; 457 NW2d 107 (1990). The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003). Whether to grant a motion for new trial is in the trial court's discretion, and its decision will not be reversed absent an abuse of that discretion. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001).

By contrast, a trial court's decision on a motion for judgment notwithstanding the verdict is reviewed de novo. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003). When deciding a motion for judgment notwithstanding the verdict, a court must view the evidence and

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[2] Because the trial court did not err in denying summary disposition as to liability and, as explained *infra*, the remainder of plaintiff's issues on appeal are without merit, it is unnecessary to address the question whether plaintiff was entitled to summary disposition on the issue of damages.

all reasonable inferences in a light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law. *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 123-124; 680 NW2d 485 (2004). It is the duty of the jury to determine the facts from evidence received in court and to apply those facts to the law. *Souvais v Leavitt*, 50 Mich 108; 15 NW 37 (1883); *Erickson v Sovars*, 356 Mich 64; 95 NW2d 844 (1959). If the evidence is such that reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005).

After review of the evidence at trial, we cannot conclude that the facts presented precluded judgment for defendants, *Merkur*, *supra*, or preponderates so heavily against the jury's finding that defendants were not negligent that it would be a miscarriage to permit the verdict to stand, *Campbell*, *supra*. Plaintiff's claim that defendants were negligent in their repair of the furnace rested primarily on the veracity of Mr. and Mrs. Runcos' testimony and statements regarding Mr. Feeback's allegedly admitted failure to properly tighten the fuel line servicing the furnace's burner. Indeed, the furnace was not itself preserved for trial and plaintiff never hired a cause and origin expert to determine where and why the leak occurred in the furnace. Thus, as acknowledged by claims adjuster Christopher Janis during his testimony on behalf of plaintiff at trial, if the jury chose not to believe the Runcos' testimony regarding Mr. Feeback's purported admission as to fault, there existed no other evidence to affirmatively support plaintiff's claim that the contamination of the Runcos' home was the result of defendants' negligent repair of the furnace on March 16, 2000.

There was, however, sufficient testimonial evidence presented at trial to allow the jury to find that defendants were not negligent in their repair of the furnace. Although it was not disputed that Mr. Feeback worked on the furnace in the general area where the leak occurred, there was evidence at trial to show that Mr. Feeback did not work on the leaky valve itself. Mr. Feeback himself testified that he did not service the leaky valve on March 16, 2000, and plaintiff's liability expert, Mr. Miller, who was shown at trial to be the only repairperson to have ever performed maintenance or repair on the valve where the leak was eventually found, admitted that "changing the nozzle," as Mr. Feeback did on March 16, 2000, would not require him to work on the fitting that leaked oil and would not have caused the leak if that fitting had been previously serviced properly.

Given the foregoing testimony and evidence, the evaluation of which was properly within the province of the jury, see *Anton v State Farm Mut Auto Ins Co*, 238 Mich App 673, 689; 607 NW2d 123 (1999), we find that the trial court did not abuse its discretion when it denied plaintiff's motion for a new trial, *Sniecinski*, *supra*. Contrary to plaintiff's assertion, the evidence at trial did not preponderate so heavily against the jury's finding that defendants were not negligent that it would be a miscarriage to permit the verdict to stand. *Campbell*, *supra*. To the contrary, the evidence and all reasonable inferences arising therefrom, when viewed in a light most favorable to defendants, was such that reasonable jurors could have honestly reached

different conclusions. *Zantel*, *supra*. Consequently, the verdict must stand, and the trial court properly denied plaintiff's motions for judgment notwithstanding the verdict or for a new trial.[3]

C. Jury Instructions

1. Violation of Sequestration Order

Plaintiff next argues that the trial court erred by giving a jury instruction that permitted the jury to consider the fact that plaintiff's witness Christopher Janis was present in the courtroom during the testimony of several other witnesses, in violation of the trial court's sequestration order. Again, we do not agree.

"In civil cases the exclusion of a witness from the courtroom during trial rests in the discretion of the trial court." *Coburn v Goldberg*, 326 Mich 280, 284; 40 NW2d 150 (1949); see also MCL 600.1420. Therefore, this Court reviews a trial court's remedy for a witness's violation of a sequestration order for an abuse of discretion. *Coburn*, *supra*. To demonstrate an abuse of discretion, however, the party seeking to establish error requiring reversal must demonstrate prejudice flowing from the sequestration decision. *Id*.

Pursuant to MRE 615, a trial court may order witnesses excluded from the courtroom during the testimony of other witnesses:

> At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize the exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's case. [MRE 615.]

The primary theory behind MRE 615 is to prevent witnesses from providing "colored" testimony, i.e., testimony that the witness may intentionally or unintentionally conform to the testimony of witnesses who have previously testified. See *People v Stanley*, 71 Mich App 56, 61; 246 NW2d 418 (1976). The exclusion of a witness during trial is not, however, the court's only remedy against such effect. As recognized by the trial court here, "[w]hen a witness does not comply with an exclusion order, the court may . . . allow the witness's noncompliance to reflect on the witness's testimony." Robinson, Longhofer & Ankers, Michigan Court Rules Practice, Evidence, § 615.3, p 425. Consistent with such practice, the trial court here composed

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[3] Plaintiff's assertion that the jury's verdict was the product of passion or prejudice owing to the nature of the plaintiff and its subrogee is not properly before this Court because plaintiff provides no argument, citation to authority, or evidence to support this assertion. See *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). In any event, to the extent any prejudice may have existed, it was addressed by the trial court's instruction to the jurors to permit neither the fact that plaintiff is an insurer nor their sympathies or prejudices to influence their decision.

and read to the jury the following special instruction:

> At the beginning of this trial, I ordered all trial witnesses to be sequestered. A sequestration order means that all of the witnesses are ordered to wait outside the courtroom until they are called in to give their testimony. People that are exempt are those that are designated as corporation party representatives or a natural person, party, plaintiff, or defendant.
>
> The court may order witnesses excluded so that they cannot hear the testimony of other witnesses. Witness exclusion is practiced so that a witness will not shape his testimony, whether consciously or unconsciously after the testimony of other witnesses.
>
> Christopher Janis was in the courtroom during the testimony of Eden Glasser and Dubie Miller. You may consider Mr. Janice's non-compliance with this court's sequestration order when you decide whether you believe the testimony of Mr. Janice and the extent to which you believe his testimony.

Plaintiff offers no evidence or substantive argument to support that the special jury instruction was prejudicial. *Coburn*, *supra*. Contrary to plaintiff's assertion, the instruction did not suggest an intentional or malicious violation of the trial court's sequestration order. Rather, the instruction merely informed the jury of the violation, and permitted the jurors to consider that fact when evaluating the testimony of Mr. Janis. Thus, because it was within the trial court's discretion to provide a remedy for Mr. Janis' violation of the sequestration order, and plaintiff has failed to show any prejudice establishing an abuse of that discretion, we find no error in the trial court's instruction. *Id*.

2. Spoliation of Evidence

Plaintiff next argues that the trial court erred in giving a jury instruction that permitted the jury to conclude that plaintiff engaged in the spoliation of evidence, when the defendants had sufficient notice and time to inspect the evidence, but failed to take the appropriate steps. We disagree.

Although claims of instructional error are reviewed de novo, *Ward v Consolidated Rail Corp*, 472 Mich 77, 83; 693 NW2d 366 (2005), the imposition of a sanction for spoliation of evidence is a matter within the discretion of the trial court and "may be disturbed only upon a finding that there has been a clear abuse of discretion." *Brenner v Kolk*, 226 Mich App 149, 159-160; 573 NW2d 65 (1997). "[I]n a case involving the failure of a party to preserve evidence, a trial court properly exercises its discretion when it carefully fashions a sanction that denies the party the fruits of the party's misconduct, but that does not interfere with the party's right to produce other relevant evidence." *Id*. at 161.

It is not disputed that following contamination of the Runcos' home, plaintiff sent Robert Puckett a letter notifying him that it held Puckett responsible for the damage caused to the Runcos' home and possessions. Mr. Puckett received this letter on March 24, 2000, which was one week after the furnace leak was discovered. A few days after receiving this letter, Mr. Puckett visited the Runcos' home and briefly inspected the furnace. Mr. Puckett did not return

for further inspections. After plaintiff filed suit, defendants successfully moved to compel entry onto the Runcos' property for the purpose of a formal inspection of the furnace and contaminated items. It was subsequently discovered, however, that the furnace had been removed from the Runcos' home two weeks after the oil leak and had since been destroyed, as had all of the contaminated items from the Runcos' home. Defendants were thus unable, for the purposes of litigation, to inspect the furnace or any other item that was alleged to have been contaminated due to the oil leak.

As a result of plaintiff's failure to ensure that the furnace and contaminated items were preserved for purposes of litigation, the trial court instructed the jury, in accordance with M Civ JI 6.01(c), as follows:

> The plaintiffs in this case have not offered the testimony of Auto Owners and the Runco's oil furnace, concrete under-furnace, the duct work, samples of oil damaged articles, the records regarding repair and replacement of the furnace.
>
> As this Evidence was under the control of the plaintiff and could have been produced by him, you may infer that the evidence would have been adverse to the plaintiff if you believe that no reasonable excuse for the plaintiff's failure to produce the evidence has been shown.

As stated in *Brenner*, *supra* at 162, a litigant has the duty to preserve evidence that is in their control and that they know or reasonably should know will be relevant to the case. See also *Bloemendaal v Town & Country Sports Center, Inc*, 255 Mich App 207, 212; 659 NW2d 684 (2002). Here, it is not disputed that plaintiff, through its subrogor, John Runco, was in control of the furnace and contaminated items, all of which were highly relevant to the case. Indeed, the furnace could have been formally inspected to determine the cause and origin of the leak in relation to the work performed on the furnace by defendants and Mr. Miller, a process admittedly not undertaken by plaintiff and of which defendants were deprived as a result of the furnace being destroyed prior to litigation. See *Brenner*, *supra* (noting that a litigant's duty to preserve relevant evidence exists "[e]ven when an action has not been commenced and there is only a potential for litigation . . . ."). Plaintiff's failure to ensure preservation of the contaminated items removed from the home similarly deprived defendants of the opportunity to challenge the nature and extent of the damages alleged, which were fervently litigated by plaintiff, through additional testing of those items.

With respect to plaintiff's assertion that defendants had sufficient notice and time to inspect the subject evidence but failed to do so, we note that although Mr. Puckett was notified on March 24, 2000 that plaintiff held Puckett responsible for the contamination, plaintiff did not file suit in this matter until October 28, 2002, more than two years later. We further note that once litigation commenced, Puckett took the necessary steps to formally inspect the furnace and contaminated items for purposes of litigation. By that point, however, the evidence had been destroyed.

Plaintiff cites *Travelers Prop Cas v Sani Vac Service, Inc*, unpublished opinion per curiam of the Court of Appeals, issued June 24, 2004 (Docket Nos. 242966 and 243860), as support for its claim of instructional error, arguing that destruction of the furnace and contaminated possessions did not create an "uneven playing field" for defendants. See *id*., slip

op at 3 (indicating that the underlying concern with spoliation of evidence is whether the loss of the evidence "created an uneven playing field"). As noted, however, plaintiff, through its subrogor, was in exclusive control of the destroyed items and although it did not perform an investigation into the cause and origin of the furnace's leak, its actions prevented defendants from better investigating the cause and extent of the damages incurred by the Runcos, which could have assisted their defense. Contrary to plaintiff's assertion, this resulted in an "uneven playing field" for defendants.

Thus, we conclude that the trial court did not abuse its discretion by instructing the jury that it could infer that the evidence would have been adverse to the plaintiff if it believed that no reasonable excuse for the plaintiff's failure to produce the evidence had been shown. To the contrary, the instruction at issue was appropriately fashioned to deny plaintiff the fruits of its misconduct without interfering with its right to present further relevant evidence. *Brenner, supra* at 161 ("[a]n appropriate sanction may be . . . an instruction to the jury that it may draw an inference adverse to the culpable party from the absence of the evidence"). Indeed, the instruction did not require, but rather merely permitted the jury to infer that the evidence at issue would have been adverse to plaintiff if it determined that plaintiff's excuse for failing to produce the evidence it controlled was not reasonable. Under the circumstances of this case, the trial court's instruction concerning spoliation of the evidence was proper.

3. Failure to Produce Evidence

Plaintiff next asserts that the trial court erred in refusing to give a jury instruction that would have permitted the jury to conclude that certain evidence not produced at trial by defendants would have been adverse to defendants. Again, we disagree.

Before trial, Mr. Feeback and Mr. Puckett provided statements regarding the instant matter to representatives of two private claim adjusting firms, General Adjustment Bureau (GAB) and United Investigations (United). In its brief on appeal, plaintiff asserts that these statements provide "uncontested reports running directly counter to statements made by appellees at trial about the presence of 'soot' and 'smoke' in the Runco home and the absence of any fuel oil, and the method used by Mr. Feeback to 'purge' the fuel line to the Lennox furnace of air." Plaintiff further asserts that it requested that defendants provide it with copies of these statements, but that defendants failed to do so and similarly failed to produce the statements as evidence at trial. Thus, plaintiff argues, it was entitled to have the jury instructed, in accordance with M Civ JI 6.01, that it could infer that the statements would have been adverse to defendants. We do not agree.

As explained by the Court in *Ward, supra* at 85-86, "[a] jury may draw an adverse inference against a party that has failed to produce evidence only when (1) the evidence was under the control of that party and could have been produced; (2) the party fails to provide a reasonable excuse for its failure to produce the evidence; and (3) the evidence is material, not merely cumulative, and not equally available to the opposing party." Here, the record fails to demonstrate that the documentation sought was in the control of defendants and "not equally available" to plaintiff. Rather, the record indicates that plaintiff merely assumed that defendants controlled the documents because the statements at issue were taken from Mr. Feeback and Mr. Puckett. Indeed, when asked by the trial court why a subpoena for the documents was not issued to the adjusting firms to which the statements were apparently given, counsel for plaintiff

simply responded, "Because they're in the direct control of the defendant, or they should be. I just can't accept the idea that they're not."

The record similarly fails to show that the subject documentation was "material" to the case. Although plaintiff asserts in its brief on appeal that the documentation at issue contains information "running directly counter" to statements made by defendants at trial, the documents are not contained in the record on appeal despite the trial court's request that counsel for plaintiff "prepare a subpoena for the documents," which the court offered to itself issue so that it could "at least look at the information and see if there's something that [could] be used any further."

Under such circumstances, the trial court did not err in failing to give an instruction that would have permitted the jury to conclude that certain evidence not produced at trial by the defendants would have been adverse to the defendants. Indeed, plaintiff failed to establish the prerequisites for such instruction, including that the subject evidence was under the control of the defendants, was not equally available to plaintiff, and was material to the case. *Id*.

4. Comparative Negligence

Plaintiff next argues that the trial court erred when it gave an instruction on comparative negligence despite a lack of evidence that either plaintiff or its subrogor, John Runco, had been negligent in connection with the events that led to the damage to the Runcos' property.[4] We disagree.

Before trial, plaintiff and defendants both requested that the jury be instructed on the issue of comparative negligence. At the close of trial, however, plaintiff withdrew its request and objected to an instruction on comparative negligence, arguing that the evidence at trial was insufficient to support negligence on the part of its subrogor. The trial court rejected this argument and instructed the jury, in accordance with M Civ JI 11.01, that "[t]he total amount of damages that the plaintiff would otherwise be entitled to recover must be reduced by the percentage of plaintiff's negligence that contributed as a proximate cause to this injury and property damage."

A trial court's determination whether an instruction is applicable and accurate is reviewed for an abuse of discretion, *Lewis v Legrow*, 258 Mich App 175, 211; 670 NW2d 675 (2003). "When deciding whether an instruction on comparative negligence is appropriate, the question is

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[4] Plaintiff also argues that since the adoption of MCL 600.2957 and 600.6304, the "better practice" would be to identify the subrogor, Mr. Runco, as a nonparty at fault for purposes of determining comparative negligence. Plaintiff asserts that such a procedure would more appropriately allow the jury to attach fault to the party who actually may have been negligent, not to the insurer, which could not possibly have been at fault. Plaintiff admits that, as subrogee, it stands in the shoes of Mr. Runco, the subrogor, but asserts that this Court should reconsider this well-established rule in circumstances where the insurer itself could not have been negligent. In doing so, however, plaintiff fails to sustain its request in this regard with any supporting argument or authority. Consequently, the issue is not properly before this Court. See *Byrne v Schneider's Iron & Metal, Inc*, 190 Mich App 176, 183; 475 NW2d 854 (1991).

whether, in viewing the evidence most favorably to the defendant, there is sufficient evidence for the jury to find negligence on the part of the plaintiff." *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 622; 563 NW2d 693 (1997) (citation and internal quotation marks omitted). "Circumstantial evidence and permissible inferences from it can constitute sufficient proof of negligence." *Id.*

Here, the evidence presented at trial included the testimony of Mr. Feeback that Mr. Runco failed to properly maintain the furnace. Both Mr. Feeback and Mr. Puckett also testified that a bucket of oil was stored for a number of days next to the furnace while it was running at full capacity, a circumstance Mr. Puckett indicated may have contributed to the odor contamination of the Runco home. Mr. Feeback also testified that Mr. Runco had, prior to the contamination of his home, complained of "smoking," the production of soot, and a "fuel odor" coming from the furnace. Furthermore, Mr. Miller testified that on one visit to the Runco home there was such an abundance of soot that he was required to place newspaper on the floor so as not to track the soot through the house. Mr. Puckett also testified that the Runco home had a short chimney with a hole in its foundation, and that under conditions such as this, the airflow in an oil-burning furnace may be disrupted, thereby producing a fuel oil smell.

We find the foregoing evidence sufficient to permit the jury to find comparative negligence on the part of the plaintiff's subrogor. *Id.* Indeed, when viewed most favorably to defendants, the bucket of oil, maintenance issues, and the furnace's past problems all may have contributed to the fuel-oil-borne contamination of the Runcos' property. *Id.* Consequently, the trial court did not err by instructing the jury on comparative negligence.

In any event, we note that because the jury found no negligence on the part of defendants, it never reached the issue of comparative negligence.[5] Thus, even were it error to instruct on comparative negligence, such error was harmless, as it could not have "resulted in such unfair prejudice to the complaining party that failure to vacate the jury verdict would be inconsistent with substantial justice." *Ward, supra* at 84 (citation and internal quotation marks omitted).

D. Case Evaluation Sanctions

Plaintiff next argues that the trial court erred when, based on MCR 2.403(O)(1), it awarded defendants reasonable attorney fees, in addition to taxable costs, where both parties rejected case evaluation. We disagree.

MCR 2.403(O) reads, in relevant part, as follows:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's *actual costs* unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the

[5] The first question presented to the jury was whether it found defendants negligent. The jury was instructed that if its answer to this question was "No," it was not to consider any further issues.

> opposing party has also rejected the evaluation, a party is entitled to *costs* only if the verdict is more favorable to that party than the case evaluation.
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> * * *
>
> (6) For purposes of this rule, *actual costs* are
>
> > (a) those costs taxable in any civil action, and
> >
> > (b) a reasonable attorney fee . . . for services necessitated by the rejection of the case evaluation. [Emphasis added.]

It is not disputed that both plaintiff and defendants rejected case evaluation. Furthermore, plaintiff concedes that the jury verdict of "no cause of action" was not more favorable to it than the case evaluation, and that the verdict was more "favorable" to the defendants than the case evaluation. Plaintiff further concedes that defendants are thus entitled to an award of case evaluation sanctions. The issue arises in the interpretation of the language included in MCR 2.403(O)(1). In the first sentence, MCR 2.403(O)(1) provides that if a party is entitled to sanctions, that party is entitled to receive "actual costs," which, pursuant to MCR 2.403(O)(6) includes taxable costs as well as a reasonable attorney fee. However, the second sentence of MCR 2.403(O)(6), which refers to the situation in the case at hand where both parties rejected case evaluation, uses only the term "costs" when granting sanctions. Thus, plaintiff argues, "costs," as used in the second sentence of MCR 2.403(O)(1) includes only those costs taxable in a civil action, which does not include a reasonable attorney fee.

However, in *Zalut v Anderson & Associates*, 186 Mich App 229, 232; 463 NW2d 236 (1990), a panel of this Court rejected the "contention that the drafters of [MCR 2.403(O)(1)], by omitting the word 'actual' when describing the costs to be awarded when both litigants reject a mediation evaluation, intended that only normal costs be awarded, and not attorney fees." In doing so, the panel stated:

> We have found nothing in the commentary to the rule or in the case law which would support plaintiffs' reading of the court rule. It is our opinion that the omission of the word "actual" in the second sentence of MCR 2.403(O)(1) describing cost was inadvertent. We believe that to read the rule any other way would create a distinction where one is not warranted or intended. [*Id*. at 232-233.]

Noting that the second sentence of MCR 2.403(O)(1) begins with the word "However," the panel further recognized that "this appears to modify the first sentence and could not have been intended to exempt from the operation of the rule all cases in which both parties reject the mediation panel's evaluation." *Id*. at 234. Thus, the panel concluded the drafters of MCR 2.403(O)(1), when omitting the word "actual" in the second sentence, did not intend to limit an award under that rule to only "costs" when both parties reject case evaluation. See also *Haliw v Sterling Heights (On Remand)*, 266 Mich App 444, 450; 702 NW2d 637 (2005) (recognizing that, under *Zalut*, actual costs, including attorney fees, are awardable when both parties reject the award as well as when only one does).

We reject plaintiff's reliance on *Dessart v Burak*, 470 Mich 37; 678 NW2d 615 (2004), as having implicitly overruled *Zalut, supra*. As argued by defendants, the Court in *Dessart* did not address whether "costs," as used in MCR 2.403(O)(1), included an award of reasonable attorney fees. Rather, the Court decided only whether the term "assessable costs," as used in MCR 2.403(O)(3) for purposes of determining whether a verdict was or was not more favorable to a party, included reasonable attorney fees. *Id*. at 40-42. Accordingly, we find plaintiff's contention that the trial court erred in awarding defendants reasonable attorney fees in addition to taxable costs when both plaintiff and defendants had rejected the case evaluation award to be without merit.

Plaintiff also claims that the trial court erred in awarding defendants additional case evaluation sanctions after defendants had a full and fair opportunity to present their claim for case evaluation sanctions. Again, we disagree.

Following a previous motion for case evaluation sanctions, which the trial court granted, defendants filed a separate motion requesting additional case evaluation sanctions in the form of attorney fees and costs incurred subsequent to defendants' initial motion for case evaluation sanctions. The trial court granted defendants additional non-duplicative, post-trial wrap up costs in the amount of $4,024. In challenging the trial court's decision to award these additional costs on appeal, plaintiff argues that MCR 2.403(O) requires that a litigant present a single, unified request for sanctions. As support for this contention, plaintiff asserts that allowing otherwise would encourage piecemeal litigation; a process that is clearly disfavored by the courts of this state. See, e.g., *Michigan Mut Liab Co v Graham*, 44 Mich App 406, 407; 205 NW2d 289 (1973) ("[p]iecemeal litigation is to be frowned on").

However, as previously noted, a litigant may seek case evaluation sanctions for trial costs and attorneys fees under MCR 2.403(O). Moreover, contrary to plaintiff's assertion, nothing in the rule indicates that recovery of such costs and fees must be confined to a single, unified request. The decision whether to grant or even entertain a motion for supplemental case evaluation sanctions is thus committed to the discretion of the trial court.

Here, plaintiff does not dispute that the costs and fees sought by defendants as sanctions permissible under MCR 2.403(O) were limited to those incurred by defendants in defense of plaintiff's motion for judgment notwithstanding the verdict or for a new trial, which was filed after defendants initial motion for case evaluation had itself been filed and scheduled for argument. Under such circumstances, the grant of defendants' supplemental motion offends neither the policy against piecemeal litigation nor the proper exercise of the trial court's discretion. The trial court did not, therefore, err in awarding defendants additional case evaluation sanctions.

Affirmed.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder